FILE COPY

Supreme Court, U.S.
FILED
APR 27 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 1969-92

EDGAR D. WHITCOMB, Governor
of the State of Indiana
Appellant,

v.

PATRICK CHAVIS, et al.

On Appeal From The United States District Court
For The Southern District of Indiana,
Indianapolis Division

BRIEF FOR APPELLANT

THEODORE L. SENDAK
Attorney General of Indiana

RICHARD C. JOHNSON
Chief Deputy Attorney General

WILLIAM F. THOMPSON
Assistant Attorney General

Attorneys for Appellant

219 State House
Indianapolis, Indiana
633-6512

C. E. Pruitt & Co., Inc., Indianapolis

INDEX

	Page
Citations	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions and Statutes Involved	2
Questions Presented for Review	4
Statement of the Case	6
Summary of Argument	16

Argument:

I. The Decision of the District Court Declaring the Multi-Member Districting Provisions of the Indiana Apportionment Act of 1965, As They Related to Marion County, Should Be Reversed Because It Was the Result of a Faulty Analysis Leading the District Court to the Erroneous Conclusion That the Situs of the Residence of Legislators Elected from Marion County Predetermined their Voting Pattern. 20

II. The Decision of the District Court Reapportioning the State of Indiana Should Be Reversed Because It Designedly Protects the Geographical and Political Solidarity of a Cognizable Racial Minority Group Found to Reside Within the Center Township Ghetto Area for the Sole Purpose of Preserving Its Political Voting Strength. 33

III. The Decision in the Case of *Stout* v. *Bottorff*, 249 F. Supp. 488 (D.C. Ind. 1965), Upholding the Constitutionality of the Indiana Apportionment Act of 1965, Served to Bar the District Court From Declaring Unconstitutional the Multi-Member Districting Provisions of the Same Act, As

Page

They Related to Marion County, and Served to Bar the District Court From Actually Reapportioning the State of Indiana, in View of This Court's Decision In *Reynolds* v. *Sims,* 377 U.S. 533, 583 (1964), Limiting the Necessity to Reapportion Constitutionally to Once Between Each Decennial Census. 35

IV. The District Court's Order Apportioning Districts for the State Legislature On the Basis of the 1960 Census Data Should Be Reversed Because of Substantial Changes and Shifts In Population Since 1960 Rendered the 1960 Census Data Obsolete and Unreliable, and Because the 1970 Census Data Would Be Available to the Next Regular Session of the State Legislature for the Purpose of Reapportioning the State. 38

V. The District Court Committed Reversible Error When It Required Single-Member Districts Throughout the State Because There Was a Clear State Preference for Some Multi-Member Districts and Because There Was An Absolute Absence of Evidence to Show That the Multi-Member Districts in the State Other Than Marion County Were in Any Way Constitutionally Infirm. 43

VI. The Court Ordered Districting Plan Should Be Reversed Because It Created Senate Districts Which Crossed County Lines Contrary to the Prohibition of Art. 4, § 6, of the Indiana Constitution and Because the Districting Plan Devised By the Court Operated to Deprive Twenty-Five Duly Elected Senators of the Right to Serve Their Full Term As Required By Art. 4, § 3, of the Indiana Constitution, and Thus Also Violated the Fourteenth Amendment to the Constitution of the United States. 46

Conclusion 50

CITATIONS

Cases:	*Page*
Baker v. Carr, 369 U.S. 186 (1962)	30
Burnett v. Davis, 382 U.S. 42 (1965)	30
Burns v. Richardson, 384 U.S. 73 (1966)	30, 32
Cahoon v. Maddox, — F.Supp. — (Atl. D. Ga. 1969) (Cause No. 13011, Decided December 9, 1969)	37, 39, 40
Chavis v. Whitcomb, 305 F.Supp. 1364 (D.C. Ind. 1969)	1, 40
Chavis v. Whitcomb, 307 F.Supp. 1362 (D.C. Ind. 1969)	1
Clay v. United States, 397 F.2d 901 (5th Cir. 1968)	31
Crawford County Bar Assc. v. Faubus, 383 U.S. 271 (1966)	30
Fortson v. Dorsey, 379 U.S. 433 (1965)	30, 45, 46
Giordano v. United States, 394 U.S. 310 (1969)	31
Gomillion v. Lightfoot, 364 U.S. 339 (1960)	33, 34
Harrison v. Schaeffer, 383 U.S. 269 (1966)	30
Hoyt v. Florida, 386 U.S. 57 (1967)	31
Kirkpatrick v. Priesler, 394 U.S. 526 (1969)	29, 31, 42, 48, 49
Mann v. Davis, 245 F.Supp. 241 (E.D. Va. 1965)	30
Nixon v. Brewer, — F.Supp. — (N.D. Ala. 1970) (Cause No. 3017-N, Decided March 4, 1970)	37, 39
Reynolds v. Sims, 377 U.S. 533, (1964)	5, 17, 29, 30, 31, 35, 37, 46, 48, 49
Schaeffer v. Thompson, 251 F.Supp. 450 (D. Wyo. 1965)	30
Skolnick v. Mayor, 415 F.2d 1291 (7th Cir. 1969)	39, 40

Page

Skolnick v. State Electoral Board, 307 F.Supp. 691 (E.D. Ill. 1969) 39,40

Stout v. Bottorff, 246 F.Supp. 825 (D.C. Ind. 1965) 6, 36

Stout v. Bottorff, 249 F.Supp. 488 (D.C. Ind. 1965) 5, 7, 8, 18, 35, 36, 37

Stout v. Hendricks, 228 F.Supp. 588 (D.C. Ind. 1963) 6, 35

Swann v. Adams, 385 U.S. 440 (1967) 48

Wells v. Rockefeller, 394 U.S. 542 (1969) 31, 42, 48

Westberry v. Sanders, 376 U.S. 1 (1964) 41

Yancey v. Faubus, 251 F.Supp. 948 (E. D. Ark. 1966) 30

United States Constitution:

U.S. Const. amend. XIV § 1 2

Indiana Constitution:

Ind. Const. art. 4, § 3 ..... 2, 19, 47

Ind. Const. art. 4, § 6 ..... 3, 19, 47

Ind. Const. art. 4, § 22 3

Ind. Const. art. 4, § 23 4

United States Statutes:

28 U.S.C. § 1253 2

Indiana Statute:

Acts of 1965 (2d. Spec. Sess.) ch. 5, § 2, 3 and ch. 4, §§ 2, 3, as found in Burns' (1969 Repl.), § 34-101 et seq. (A. 426) 2, 7, 9

Miscellaneous:

Madison Federalist Paper No. 10 31

IN THE

Supreme Court of the United States

October Term, 1969

No. 1198

EDGAR D. WHITCOMB, Governor
of the State of Indiana
Appellant,

v.

PATRICK CHAVIS, et al.

On Appeal From The United States District Court
For The Southern District of Indiana,
Indianapolis Division

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the district court in which it declared the multi-member districting provisions of the Indiana Apportionment Act of 1965, as they related to Marion County, unconstitutional is reported at 305 F.Supp. 1364 and also appears in the Appendix in this cause. (A. p. 335). The opinion and order of the district court reapportioning the state is reported at 307 F.Supp. 1362, and appears in the Appendix in this cause. (A. p. 390).

JURISDICTION

A three judge panel was convened to hear this cause. The order of the district court reapportioning the State of Indiana was entered on December 15, 1969. (A. p. 390). A timely notice of appeal from that order was filed with the district court on December 22, 1969. On February 18, 1970, the case was docketed, with the filing of a jurisdictional statement. Probable jurisdiction was noted on March 23, 1970. (A. p. 425). The jurisdiction of this Court rests on 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Indiana Acts of 1965 (2d Spec. Sess.) ch. 5, § 3 and ch. 4, § 3, as found in Burns' (1969 Repl.), §§ 34-104 and 34-102, respectively, as they related to Marion County, State of Indiana are the state laws involved in this cause. Although only the multi-member districting provisions of this Act, as they related to Marion County, were declared unconstitutional in this cause, the entire act, hereafter referred to as the Indiana Apportionment Act of 1965, has been included and appears in the Appendix in this cause. (A. p. 426).

U.S. Const. amend. XIV, § 1 provides in part that:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of law."

Ind. Const. art. 4, § 3, provides that:

Term of Office.

> "Senators shall be elected for the term of four years, and Representatives for the term of two years, from the day next after their general election: Pro-

vided, however, that the Senators elect, at the second meeting of the General Assembly under this Constitution, shall be divided, by lot, into two equal classes, as nearly as may be; and the seats of Senators of the first class shall be vacated at the expiration of two years, and those of the second class, at the expiration of four years; so that one-half, as nearly as possible, shall be chosen biennially forever thereafter. And in case of increase in the number of Senators, they shall be so annexed, by lot, to one or the other of the two classes, as to keep them as nearly equal as practicable."

Ind. Const. art. 4, § 6, provides that:

Districts.

"A Senatorial or Representative District, where more than one county shall constitute a district, shall be composed of contiguous counties; and no county, for Senatorial apportionment, shall never be divided."

Ind. Const. art. 4, § 22, provides that:

Local or special laws forbidden.

"The General Assembly shall not pass local or special laws, in any of the following enumerated cases, that is to say:

1. Regulating the jurisdiction and duties of justices of the Peace and of Constables;

2. For the punishment of crimes and misdemeanors;

3. Regulating the practice in courts of justice;

4. Providing for changing the venue in civil and criminal cases;

5. Granting divorces;

6. Changing the names of persons;

7. For laying out, opening and working on high ways, and for the election or appointment of supervisors;

8. Vacating roads, town plats, streets, alleys and public squares;

9. Summoning and impaneling grand and petit juries, and providing for their compensation;

10. Regulating county and township business;

11. Regulating the election of county and township officers and their compensation;

12. For the assessment and collection of taxes for State, county, township, or road purposes;

13. Providing for supporting common schools, and for the preservation of school funds;

14. In relation to fees or salaries: except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required;

15. In relation to interest on money;

16. Providing for opening and conducting elections of State, county, or township officers, and designating the places of voting;

17. Providing for the sale of real estate belonging to minors or other persons laboring under legal disabilities, by executors, administrators, guardians, or trustees."

Ind. Const. art. 4, § 23, provides that:

Laws must be general.

"In all the cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

QUESTIONS PRESENTED FOR REVIEW

1. Whether the decision of the district court reapportioning the State of Indiana must be reversed because its judgment that the multi-member districting provisions of the Indiana Apportionment Act of 1965, as they related to Marion County, was the result of a fault-ridden analysis erroneously based on social, racial and economic factors and based on the situs of the residence of legislators elected from Marion County.

2. Whether the decision of the district court reapportioning the State of Indiana should be reversed because it was expressly designed to freeze in place the geographical and political integrity of a cognizable racial minority group found to reside within the Center Township Ghetto area for the sole purpose of preserving its voting strength.

3. Whether the decision of the district court in the case of *Stout v. Bottorff*, 249 F.Supp. 488 (D.C. Ind. 1965), upholding the constitutionality of the Indiana Apportionment Act of 1965, served to bar the district court from declaring unconstitutional the multi-member districting provisions of the same Act, as they related to Marion County, or served to bar the district court from actually reapportioning the State of Indiana, in view of this Court's decision in *Reynolds v. Sims*, 377 U.S. 533, 583 (1964), limiting the necessity to reapportion constitutionally to once between each decennial census.

4. Whether the district court erroneously apportioned districts for the state legislature on the basis of the 1960 census data, even though substantial changes and shifts in populaton since 1960 had rendered the 1960 census data unreliable and even though the 1970 census data would be available to the next regular session of the state legislature for the purpose of reapportioning the State.

5. Whether the district court erroneously required single-member districts throughout the State, even though there was a clear state preference for some multi-member districts and even though there was an absence of evidence that multi-member districts in the state other than Marion County were in some way constitutionally infirm.

6. Whether the court-ordered districting plan should be reversed because it created senate districts which crossed county lines contrary to the prohibition of Article 4, § 6, of the Indiana Constitution and because the districting plan

devised by the court operated to deprive twenty-five duly elected senators of the right to serve out their full four year term as required by Article 4, § 3, of the Indiana Constitution, in violation of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The history of Indiana's efforts to reapportion the districts for the Indiana General Assembly, constitutionally, began with the district court's decision in *Stout v. Hendricks*, 228 F.Supp. 568 (D.C. Ind. 1963), which declared unconstitutional a 1921 Act apportioning districts for the state legislature. The district court enjoined the state from conducting any further elections for the state legislature under the 1921 Acts, but postponed the effect of the injunction until after the 1964 elections.

During the 1963 regular session of the state legislature a new apportionment act was passed, but was vetoed by the Governor. The legislature failed to override the Governor's veto. Subsequently, the Indiana Supreme Court effectively set aside the veto and the 1964 elections were conducted under the 1963 Act.

The 1965 regular session of the state legislature again enacted legislation reapportioning the state. However, the district court found these acts to be constitutionally infirm in *Stout v. Bottorff*, 246 F.Supp. 825 (D.C. Ind. 1965).

In response to the district court's decision in the first *Stout* case, *supra*, a second special session of the state legislature was convened on October 18, 1965. In its second special session of that year, the state legislature enacted four acts apportioning the Senate and four acts apportioning the House of Representatives. The acts were then submitted to the district court as plans to be considered in the alternative. These alternative acts were considered by the

district court in what may be called the second *Stout* case. *Stout v. Bottorff*, 249 F.Supp. 488 (D.C. Ind. 1965). Of the plans submitted, the district court selected what were referred to in its opinion as Senate Plan B and House Plan C, which that federal district court said met federal constitutional standards. Senate Plan B and House Plan C were what will be referred to subsequently in this brief as the Indiana Apportionment Act of 1965, Indiana Acts of 1965 (2nd Spec. Sess.) chapters 4 and 5, as found in Burns (1968 Repl.), §§ 34-101, *et seq.* It is § 3 of each of these chapters, as it related to Marion County, which the district court in 1969 found to be unconstitutional in this cause.

Voter population data were the basis for the Indiana Apportionment Acts of 1965, approved by the district court as meeting federal constitutional standards in the second *Stout* case, *supra*. Using voter population data, the district court found that, as to the Senate, there were only two instances where the sum of the extreme deviations above and below the ideal resulted in overall deviations in excess of 20%. In all other instances, the sum of the deviations above and below the ideal was less than 20%. The ratio of the district with the largest population per senator to the smallest district was 1.27 to 1. The minimum percentage of total voting population residing in districts which could elect a majority of the senators was 49.46%. 249 F.Supp., at p. 491.

As to the House of Representatives, the district court found, in one instance, an overall deviation in excess of 20%. In all other instances, the sum of the deviations above and below the ideal was less than 20%. The ratio of the district with the largest population per representative to the smallest was 1.26 to 1. The minimum percentage of voters which could elect a majority of the House of Representatives was 48.72%. 249 F.Supp., at p. 493.

In approving the constitutionality of the Indiana Apportionment Act of 1965, the district court expressly found the Act to be an acceptable accommodation between the State and Federal Constitutions. The district court said:

> "With respect to the requirements of Indiana law: Under Senate Plan B and House Plan C the counties are contiguous; no county has been divided for senatorial districts; and each county with a ratio is represented by a member of the legislature. Wherever practicable, the General Assembly avoided grouping one county with less than a ratio in a district with other counties to give the former a voice in electing more than one member; and wherever practicable it had avoided forming districts containing large fractions unrepresented while providing overrepresentation for other districts.
>
> "We think that the foregoing relation of Senate Plan B and House Plan C to the federal and state standards shows a harmonious accommodation of both in solving a difficult problem." (Footnotes omitted.) 249 F.Supp., at p. 494.

This cause was initiated when plaintiffs-appellees, hereafter referred to as voters, representing various interests within the state, instituted a declaratory action for a judgment declaring that the multi-member districting provisions of the Indiana Apportionment Act of 1965, as they related to Marion County, operated invidiously to deprive certain voters of the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. In their complaint, the appellees limited their attack to the multi-member districting provisions of the Indiana Apportionment Acts of 1965 as they related to Marion County. (A. pp. 1, 340).

A three-judge panel was convened to hear the case. The court refused to hear the case as a class action. Consequently, the appellees proceeded in their individual capacities.

With the exception of Walker, all of the appellees in this cause were residents of Marion County. Walker was described as a Negro resident of Lake County, Indiana, another multi-member district within the state. Of the five appellees who were residents of Marion County, namely Chavis, Ramsey, Hotz, Allen and Bryant, only Mason Bryant was a resident and voter of what the district court defined as the "Center Township Ghetto." Chavis was described as a voter and resident of Marion County, Indiana, within the City of Indianapolis, but outside the "Center Township Ghetto." Although Ramsey, a Negro-American, was described as a voter and a resident of the "Center Township Ghetto," within Marion County, there was no evidence that he did in fact reside within the "Center Township Ghetto." (A. p. 376). Hotz was described as a White-American, a voter and a resident of Marion County outside the City of Indianapolis. Allen was described only as an independent voter residing within Marion County. (A. pp. 336-341, 373-376).

The district court found that the multi-member districting scheme of the Indiana Apportionment Act of 1965, as to Marion County only, unconstitutionally minimized and rendered ineffective the vote of Negroes residing in the "Center Township Ghetto," thereby necessitating a redistricting of Marion County. (A. p. 376). Thus, it reasoned, the multi-member districting provisions of the Indiana Apportionment Act of 1965, Acts of 1965, (2nd Spec. Sess.), ch. 5, § 3 and ch. 4, § 3, as found in Burns' (1968 Repl.), §§ 34-104 and 34-102, respectively, as they related to Marion County, operated to minimize and cancel out the voting strength of a cognizable racial minority group (the "Center Township Ghetto") and were found to be unconstitutional because they deprived that group of the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States. (A. pp. 331-332).

The district court also found that the evidence established that Mason Bryant was a resident and voter of the "Center Township Ghetto," with proper standing to sue, and thus entitled to the relief for which he prayed in his complaint. (A. p. 376). However, there was a failure of proof as to all other voters who were parties to the action. (A. pp. 373-376).

The "Center Township Ghetto" is an area within Marion County, Indiana, which was delineated by boundaries selected by the district court itself. It is inhabited by what the district court found to be a cognizable racial group. A "ghetto" was defined as:

> "A primarily residential area of an urban area characterized by higher relative density of population and a higher relative proportion of substandard housing than in the overall metropolitan area which is inhabited predominately by members of a racial, ethnic, or other minority group, most of whom are of lower socio economic status than the prevailing economic status in the metropolitan area and whose residence in the section is often the result of social, legal, or economic restrictions or custom." (A. p. 348).

Applying this definition, the district court found that a cognizable racial group resided in an area denominated by the district court as the "Center Township Ghetto." The district court defined the "Center Township Ghetto" as consisting of 1960 census tracts 501-520, 528-531, 534-536, 540, those portions of 521-523 which are north Massachusetts Avenue and those portions of 537 which are north and east of White River. The 1967 population of the ghetto so defined consisted of 97,000 non-whites (of whom approximately 99.8% are Negro) and 35,000 Whites. (A. p. 349; see also A. p. 360, for a map illustrating the "Center Township Ghetto").

Marion County is composed of nine townships and numerous census tracts. To show that the "Center Township Ghetto" was populated by a homogenous group which was sufficiently differentiated from the rest of the county to be entitled to "native" legislators, ten census tracts were selected from two townships within Marion County. Two census tracts were selected from Washington Township, tracts 211 and 220, and eight census tracts were selected from Center Township, tracts 507, 511, 517, 530, 535, 537, 540 and 563. Of the eight census tracts for Center Township, only one census tract, tract 563, was wholly outside the "Center Township Ghetto." Only a portion of census tract 537 was outside the "Center Township Ghetto," while the remaining six census tracts were wholly within the "Center Township Ghetto." (A. pp. 349-350).

The district court analyzed and compared the census tracts on the basis of housing characteristics, social characteristics, and economic characteristics gleaned from other studies. All comparisons included the percentage of white versus non-white residents for 1960 and 1967. Housing characteristics involved a consideration of such factors as the percentage of: non-white dwelling units, crowded dwelling units, owner occupied dwellings, housing units built prior to 1940 and dilapidated and deteriorated housing. (See Table 1, A. p. 351). Social or sociological characteristics involved a consideration of the percentage of: recipients of old age assistance (Social Security), persons over the age of twenty-five having completed high school, juvenile delinquency cases and the rate of unemployment. (See Table 2, A. p. 352). Economic characteristics involved a consideration of median family income for 1959, 1969 and projections for 1985 and a projected estimate for automobile ownership per family for the year 1985. (See Table 3, p. 353).

Based on the analysis in the tables illustrating housing, social and economic characteristics for selected census tracts in Center and Washington Townships, of Marion County, a fourth table was prepared rearranging and setting out in one table the information contained in the former three tables. (See Table 4, Critical Differentiating Characteristics, A. pp. 354-355). In the differentiating table, two census tracts, tracts 211 and 563 were omitted. Seven tracts from the "Center Township Ghetto" were compared to one tract, tract 220, from Washington Township.

In the district court's opinion, there were statistical differences between Tract 220 and the Ghetto tracts which represented compelling interests in such legislative areas as urban renewal and rehabilitation, health care, employment training and opportunities, welfare and relief for the poor, law enforcement, quality of education, and anti-discrimination measures. (A. p. 358). These, the court found, were interests solely of the Ghetto.

Based on an analysis of Tables 1, 2, 3 and 4, the district court concluded that the "Center Township Ghetto" was characterized by a predominately Negro population having a lower income, having a higher juvenile crime rate, and having a higher unemployment rate than the rest of Marion County. The district court concluded that some of the characteristics upon which it relied would continue into the future as far as 1985, based on certain of its projected estimates. (A. pp. 21-24).

Having set apart an area of Marion County and having given it a name, the district court compared the number of residents of the "Center Township Ghetto" who were elected to the state legislature during the preceding ten years with the number of residents of Washington Township who were elected to the state legislature during the same period. The areas selected were compared on the

basis of the ratio of legislators to population of each area. First, a ratio for the number of legislators elected to the state legislature during the preceding ten years who resided in Washington Township to the entire number of legislators elected from Marion County was computed. A similar ratio was computed for legislators who were residents of the "Center Township Ghetto." Secondly, a ratio for the population of Washington Township to the population of all of Marion County was computed. A similar ratio was computed for the "Center Township Ghetto." (See Table 7, A. p. 362). The ratios computed in the first and second steps were then compared. On comparison, the ratios showed that more legislators per person resided in Washington Township, comparing the number of legislators who were resident in Washington Township to the number of persons who resided in Washington Township, than resided in the "Center Township Ghetto." (A. pp. 363-364; see also Table 8, A. p. 363). Nevertheless, all legislators chosen for comparison purposes were residents of Marion County.

This, in the court's opinion, was evidence of the overrepresentation of Washington Township and the underrepresentation of the "Center Township Ghetto." The district court concluded that, since disproportionately fewer legislators elected to the state legislature from Marion County were residents of the Ghetto than were residents of Washington Township, therefore the votes of residents within the "Center Township Ghetto" were diluted, minimized, and cancelled out.

Certain other political factors, in the district court's opinion, also tended to minimize the votes of residents of the "Center Township Ghetto." First, the court said that because positions taken on political issues by legislators elected from Marion County at large tended to coalesce, causing these legislators to maintain a common undiffer-

entiated position, the representation of minority interest groups within the county was "obviated." (A. p. 364). Secondly, the court said that county organizations of the two major political parties of Marion County, particularly the county chairmen, exerted a very substantial influence over the nomination of candidates for the state legislature. (A. p. 365). And finally, the court made the observation that Marion County political organizations continued to exert considerable control over the actions of legislators from Marion County after they are elected. (A. p. 365).

The district court found that the only practical remedy for the deprivation of voting strength was the elimination of the large multi-member house and senate district for Marion County. (A. p. 332).

The district court concluded that a redistricting of Marion County was neccessitated. Conceding that the voters had directed their complaint to bring about a redistricting of Marion County only, the district court went on to consider other evidence applying to both Marion County and the state of Indiana as a whole. (A. p. 376). First of all, the district court considered the testimony of John Banzhaf, an Associate Professor of Law at George Washington University. (A. pp. 139-155). Banzhaf testified that, based on his theoretical mathematical analysis, a voter in a multi-member district, having more legislators from which to choose, has a greater theoretical opportunity to cast a critical or deciding vote in any legislative election, than say a voter in a single-member district. Furthermore, theoretically, when representatives of a multi-member district vote as a bloc in a legislative body, each representative's vote has a greater weight than that of a representative of a single-member district. Moreover, the district court concluded that each Marion County voter has a greater voice in the legislature than does a comparable

voter in a single-member district. (A. pp. 141-149; Court's Opinion, p. 378). Secondly, in applying 1960 census data and 1967 Indiana Board of Health vital statistics data to the districts created by the Indiana Apportionment Act of 1965, the district court found that the variances among the districts exceeded the guidelines laid down by this Court. (A. pp. 369-371, 381-55). Thus, applying 1960 and 1967 population data, the district court found that to redistrict Marion County alone would leave the legislature confronted with impermissible population variations between the new Marion County districts and other districts in the state. (A. pp. 332, 369, 377, 391). Furthermore, applying Banzhaf's analysis, the district court concluded that any redistricting scheme must provide for uniform districts. (A. p. 379).

Accordingly, on July 28, 1969, the district court declared the multi-member districting provisions of the Indiana Apportionment Act of 1965, as they related to Marion County, unconstitutional. The district court then gave the state until October 1, 1969, to enact new apportionment legislation. (A. pp. 331, 334).

On October 15, 1969, the district court took judicial notice of the fact that the state legislature had not enacted new legislation apportioning the state. Consequently, the district court concluded that it would redistrict the state. (A. p. 392). The district court invited proposed plans from the parties and legislative leaders. On October 17, 1969, the district court announced minimal guidelines for submission of proposed plans. The district court announced that 1960 census data would be used as the basis for reapportioning, that single member districts would be preferred to multi-member districts, and that county and township lines would be crossed when necessary. (A. p. 392).

On December 15, 1969, the district court entered a second order. (A. pp. 390-420). The district court enjoined all state election officials from conducting any primary, general or special elections for state legislature under the Indiana Apportionment Act of 1965. Further, the district court mandated all state election officials to conduct all primary, general and special elections for the year 1970 for the state legislature by use of the districts created and described by the district court in its order. (A. pp. 399-400; For the court's plan, See A. pp. 401-420). The plan adopted by the court, in the district court's own words, ". . . protects the legally cognizable racial minority group against dilution of its voting strength. . . ." (A. p. 395). The district court also said that "[i]n establishing district lines for the metropolitan areas of the state, the Court has taken judicial notice of the 1960 census statistics as to the location of the non-white population [;] [t]he single-member district plan gives recognition to the cognizable racial minority group whose grievance led to this litigation." The plan adopted by the district court was based on 1960 census data and required single-member districts; it also crossed county lines and prevented twenty-five (25) senators elected to 4-year terms in 1968 from serving the remaining two years of their four-year terms. (A. pp. 397-398).

SUMMARY OF ARGUMENT

The judgment of the district court reapportioning the state of Indiana was based on an invalid premise that the multi-member districting provisions of the Indiana Apportionment Act of 1965 as they related to Marion County were unconstitutional.

The invalid premise upon which the district court's decision was based was its earlier judgment that the multi-member districting provisions of the Indiana Apportion-

ment Act of 1965, as they related to Marion County, were unconstitutional. That the "Center Township Ghetto" existed was a statistical inference based on other statistical inferences, and hence gross speculation. Even conceding the existence of the "Center Township Ghetto," the situs of the residence of legislators elected from Marion County is not in and of itself evidence that the interests of the residents of the ghetto were treated in the state legislature any differently than interests of the residents of the rest of the county. Furthermore, the sole basis for differentiating the "Center Township Ghetto" from the rest of the county was social, racial and economic factors supposedly prevailing in the ghetto. The one-man one-vote principle enunciated by this Court does not recognize such social, racial and economic factors as controlling. In any event, at best, the appellees have shown no more than that the residents of the ghetto have special interests. However, the principle of proportional representation in government, enunciated by this Court, had never required, and indeed should not require, proportional representation for special interest groups. This violates the spirit as well as the letter of American Constitutional Law.

The court ordered districting plan was expressly designed to protect the geographical and political integrity of a cognizable racial minority group found to reside within the "Center Township Ghetto" solely for the purpose of preserving its voting strength. This can be regarded as no less than gerrymandering of the variety condemned by this Court. District lines simply cannot be drawn with a view to the characteristics of the citizens residing within those lines.

In *Reynolds v. Sims*, 377 U.S. 533, 583 (1964), this Court declared that decennial reapportionment was a rational and constitutionally acceptable principle. The constitution-

ality of the Indiana Apportionment Act of 1965 was submitted to the district court in the case of *Stout v. Bottorf*, 249 F. Supp. 488 (D.C. Ind. 1965). The district court specifically found that the Act met the requirements of this Court and was, hence, constitutionally sound. Thus, the district court in this cause, was barred from reconsidering the constitutionality of the Indiana Apportionment Act of 1965, and from reapportioning the state in 1969, before the 1970 census data became available and the state legislature had had an opportunity to reapportion the state on the basis of the 1970 census data. Minimum standards for stability in the law require such a decision.

The district court erroneously reapportioned districts for the state legislature on the basis of the obsolete 1960 census data. The time was the fall of 1969. That substantial changes and shifts in population since 1960 had rendered the 1960 census data unreliable was a well established fact. Therefore, a realistic, constitutionally-sound plan of reapportionment on the basis of the 1960 census data was impossible at that time. Furthermore, the 1970 census data would be available to the next regular session of the state legislature for the purpose of reapportioning the state. Moreover, action of the state legislature is the constitutionally preferrable means to reapportion districts for the state legislature.

The district court erroneously required single-member districts *throughout* the state. This was not a mere happenstance. It was a direct concomitant of the conclusion of the district court that a combination of multi-member districts with single-member districts was unconstitutional *per se*. In the alternative, the district court concluded that to be constitutionally accepted all districts within a state must be of uniform size. The district court applied Banzhaf's analysis to a highly speculative set of facts regarding Marion County and concluded that inequality of size among dis-

tricts resulted in inequality of representation in the state legislature for the residents of those districts. According to Banzhaf, voters in a multi-member district had a greater weight because there were more candidates from which to choose and because they had more legislators representing them.

The district court's reapportionment plan created senate districts which crossed county lines contrary to the prohibition of Article 4, § 6, of the Indiana constitution and deprived twenty-five duly-elected Senators of the right to serve their full four-year term as required by Article 4, § 3, of the Indiana constitution. The state does not contend that the district court's violations of the Indiana constitution were error *per se*. However, the state submits that the decision of the district court in this regard should be reversed because the district court completely ignored the provisions of the Indiana Constitution without any justification whatsoever. The district court announced that pure mathematical equality was the result to be achieved, and the district court's plan approached pure mathematical equality. This Court has never required pure mathematical equality in devising districts for a state legislature. In reapportioning the state, the district court was bound to observe the requirements of the Indiana Constitution if at all possible, as the state legislature must. This, the state submits, the district court did not do. Further, the state submits that if the district court is to violate the provisions of the Indiana constitution, the violation must be justified. The district court did not adequately justify its violation of the Indiana Constitution.

ARGUMENT

I

THE DECISION OF THE DISTRICT COURT DECLARING THE MULTI-MEMBER DISTRICTING PROVISIONS OF THE INDIANA APPORTIONMENT ACT OF 1965, AS THEY RELATED TO MARION COUNTY, SHOULD BE REVERSED BECAUSE IT WAS THE RESULT OF A FAULTY ANALYSIS LEADING THE DISTRICT COURT TO THE ERRONEOUS CONCLUSION THAT THE SITUS OF THE RESIDENCE OF LEGISLATORS ELECTED FROM MARION COUNTY PREDETERMINED THEIR VOTING PATTERN.

The decision of the district court declaring unconstitutional the multi-member districting provisions of the Indiana Apportionment Act of 1965, as they related to Marion County, should be reversed. The decision of the district court was based on two factors. First of all, the district court found that the residents of the geographical area designated as the "Center Township Ghetto" have legislative interests significantly different from those of the residents of the remainder of the county. Secondly, the district court found that of the legislators elected from Marion County, disproportionately fewer legislators resided in the "Center Township Ghetto" than resided in Washington Township. Significantly, the district court did not find that the legislators elected from Marion County were not responsive to, ignored, or acted in ways contrary to the interests of the residents of the "Center Township Ghetto." At most, the factors relied upon by the district court in distinguishing the "Center Township Ghetto" are of dubious value.

The designation of the "Center Township Ghetto" as an identifiable entity has an unrealistic quality about it. Serious questions arise regarding the district court's analysis and its use of statistics in reaching its conclusions.

Though statistical analysis is not, generally, the legal professions strong suit, there are, nevertheless, certain general statistical principles of which cognizance may be taken. For instance, we know that the smaller the sample, the greater the probability of error. We know that the probability of error in the conclusions reached on the basis of any statistical analysis may be estimated. We know that sampling techniques and the extent of the sample affect the accuracy of the results obtained. And finally, we know that the results of any statistical analysis are merely conclusions based on inferences drawn from the raw data collected.

Turning to the opinion below, the state notes that the district court purported to conduct a statistical analysis of certain characteristics of the population of Marion County. That the district court was conducting a statistical analysis may be gathered from its opinion. (A. pp. 348-359). A reference to the footnotes to Tables 1, 2 and 3 shows that the information contained in those tables was extracted from exhibits introduced as evidence by the plaintiffs and defendants which were in fact previously compiled statistical analyses of Marion County. (A. pp. 351-353). The district court's Table 4, supposedly proving the existence of the "Center Township Ghetto," is merely a rearrangement of the information set out in Tables 1, 2 and 3. (A. pp. 354-355). And finally, when the district court referred to Table 4, it spoke of "statistical differences" which in its opinion proved the existence of the "Center Township Ghetto" (A. p. 358).

The district court's statistical analysis which was designed to prove the existence of the "Center Township Ghetto" was in fact based upon previously compiled statistical analyses. In any statistical analysis, a method of selection is chosen, usually random, and raw data is collected. After collection, the raw data are assembled and conclu-

sions are drawn. The conclusions drawn are what appear as a statistical analysis. However, the conclusions drawn, and hence, the statistical analysis itself, are no more than inferences drawn from randomly collected raw data. Typically, based on the method of selection and the size of the sample for conducting the analysis, a standard estimate of error is computed to show the limits within which the probabilities are that the conclusions drawn represent reality.

In this case, exhibits of the state and the voters, representing previously compiled studies, were the starting point and hence the "raw data" upon which the district court based its inferences. The statistical studies used by the district court are set out in the footnotes to Tables 1, 2 and 3. (A. pp. 351-353). Based on these previous studies, the district court conducted a study of its own. The raw data for the district court's study were conclusions drawn in previous studies. The district court sample was small. The data were not randomly selected from the county. The voters had alleged in their complaint that a "ghetto" existed. Using that as a starting point the district court randomly selected census tracts from those alleged in the complaint as comprising a "ghetto." Thus, rather than selecting census tracks randomly from the county to discover whether there was an area within the county sufficiently differentiated from the rest of the county, the district court's starting point was that a "ghetto" did in fact exist. It reasoned from its own assumptions.

That the district court's method of selecting census tracts leaves much to be desired is illustrated in the court's opinion. Tracts 211 and 220 were specifically choosen for comparison purposes. Although, tract 563 was apparently selected at random, the sample from which it was selected appears to have been quite limited. Of the remaining seven census tracts selected, apparently at random, the

sample from which they were selected was limited to an area designated in the complaint as a "ghetto." (A. pp. 349-350). Thus, the "ghetto" was presumed to exist.

The sample upon which the district court relied was small in relation to the area to be represented. There were one hundred and eighty-two (182) census tracts in Marion County. There are nine townships in Marion County. The district court's study was based on only ten census tracts from only two townships within Marion County. Of the ten census tracts studied, all or a part of the seven chosen were from an area predesignated as a "ghetto."

Table 4 was the table significant to a determination in this cause. (A. pp. 354-355). It was on the basis of Table 4, that the district court concluded that the "Center Township Ghetto" existed and that it was sufficiently distinguishable from the rest of the County to merit special consideration. However, an examination of Table 4 readily reveals that only eight, of a possible one hundred and eighty-two (182) census tracts were compared. Of the eight only one lay wholly outside what the court designated as the "Center Township Ghetto." That was census tract 220. A comparison of the characteristics chosen by the court to describe tract 220 with the characteristics of the "ghetto" tracts, the remaining seven, reveals that there is little to distinguish tract 220 from the "ghetto" tracts. All of the characteristics of tract 220 are within the range of the characteristics of the remaining seven "ghetto" tracts. (See Table 4, pp. 354-355).

In sum, the court's statistical study, used to show that the "Center Township Ghetto" was a reality, cannot be used to support its conclusions in this case. The sample was so small as to be meaningless. The method of selection was biased from the beginning. The district court's statistical analysis was not original, but rather, was based on

previously compiled statistical studies. To the extent that any statistical study represents conclusions based on inferences drawn from raw data, the "Center Township Ghetto" is a statistical inference drawn from inferences drawn from a previous study. In other words, that the "Center Township Ghetto" exists is an inference based on inference. Therefore any decision based on it is a matter of speculation, and consequently in error.

The second basic factor supporting the district court's decision was a finding that disproportionately fewer legislators resided in the area designated as the "Center Township Ghetto" than resided in Washington Township. If the "Center Township Ghetto" is no more than a creation existing only in the imagination, having no basis in reality, then the case is at an end, and the decision of the district court must be reversed because there exists no segment of the population to be compared with the number of legislators per person residing in Washington Township or any other area selected within Marion County. However, assuming *arguendo,* that the "Center Township Ghetto" described by the district court's decision does in fact exist, it then becomes necessary to scrutinize the district court's finding that disproportionately fewer legislators resided in the "Center Township Ghetto" than resided in Washington Township.

The state submits that there is no basis in fact or in the evidence for comparing resident legislators per person of Washington Township to that of Center Township, the "Center Township Ghetto" or to any other geographical area in Marion County. The district court's sole basis for differentiating Washington Township from the "Ghetto" follows from the court's comparison of Tract 220, within Center Township, to the "Ghetto." (See Table 4, Critical Differentiating Characteristics, A. pp. 354-355 and the court's explanation, pp. 355-359). Comparing census tract

220 to census tract 507 within the "Ghetto" we see that there is little to differentiate census tract 220 from tract 507. If anything we might say that the residents of tract 507, a "Ghetto tract," are better off than the residents of tract 220 (Table 4, A. pp. 354-355). Thirty-Eighth Street is all that separates tract 220 from the Ghetto. Moreover, the voters in this case would have this Court believe that persons, having little or nothing to differentiate them, are over-represented on one side of the street but under-represented on the other. Furthermore, having differentiated tract 220 from the "Ghetto," the district court implicitly assumes that tract 220 is representative of the rest of Washington Township. There is absolutely nothing factually in the evidence to support that assumption.

Marion County is geographically divided into nine townships. There is absolutely no basis in fact or in the evidence in this cause for differentiating one township from another. Township lines are arbitrarily drawn and have no significance for the casting of votes in the state legislature. For instance, legislators residing within Washington Township could not, even if they so desired, obtain the enactment of legislation which would benefit solely the residents of Washington Township. Art. 4, § 22 of the Indiana Constitution provides that "[t]he General Assembly shall not pass local or special laws . . ." in certain designated instances including any law: 1) "regulating county and township business"; 2) "regulating the election of county and township officers and their compensation"; 3) "for the assessment and collection of taxes for State, county, township, or road purposes"; 4) "providing for supporting common schools and for the preservation of school funds"; or 5) "providing for opening and conducting elections of State, county or township officers, and designating the places of voting."

To insure the uniform operation of laws throughout the state, the Indiana Constitution also provides in Art. 4, § 23 that "[i]n all the cases enumerated in the preceeding Section [Art. 4, § 22, *supra*], and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." Art. 4, §§ 22 and 23, have been interpreted consistently by the courts of this state to prohibit the enactment of legislation for the benefit of any single township within the state. Notwithstanding the prohibitions of the Indiana Constitution, there is still no basis in fact or in the evidence in this cause for concluding that the legislators who resided in Washington Township acted solely in the interest of those residing within Washington Township. Nor is there any basis for concluding that the legislators residing in Washington Township ignored the interests of the ghettoites. Significantly, voter Chavis, a Negro resident outside the "Ghetto," has served as a state senator from Marion County.

The controlling factor in this cause must be, assuming the Ghetto exists, how the interests of the residents of the "Ghetto" were treated in the state legislature. The most the district court could say of the interests of the Ghetto was that, apart from the interests of the Ghetto and county in common, statistical differences between tract 220 and the Ghetto represented compelling interests of the Ghetto ". . . in such legislative areas as urban renewal and rehabilitation, health care, employment training and opportunities, welfare and relief of the poor, law enforcement, quality of education, and anti-discrimination measures." (A. p. 358). The state submits that the compelling interests of the Ghetto, supposedly special interests of the Ghetto, are in reality county-wide interests. First of all, there is no basis in fact or in law for concluding that the compelling interests of the Ghetto are in fact interests solely of the Ghetto. Secondly, and more important there is no basis in

fact or in law for concluding that the compelling interests of the Ghetto have been ignored in the state legislature. In point of fact, a disproportionally larger share of tax funds is actually spent in the "Ghetto" area for welfare, relief, urban renewal, etc. Nor is there any basis for concluding that, given another set of facts such as an election according to districts drawn by the district court in its order of December 15, 1969, the interest of the Ghetto would be served any differently.

As a matter of fact, the voters in this cause have at best done no more than show that they represent a special interest group. In the American system of government a special interest group is not represented by legislators, it is represented by lobbyists. The voters in this case are no more than lobbyists. Their remedy is not the judiciary. Their remedy is active lobbying in the state legislature as in the case of any other special interest group.

To carry the lobby analysis further, it is repugnant to our system of government to elect legislators by interest group. The interests of the people of the State of Indiana are myriad. Barbers, lawyers, doctors, educators, rich, middle class, poor, rural and urban dwellers, to name a few, all have special interests. Our system of government simply does not provide for the election of legislators by special interest group. The interest of the Ghetto, if the Ghetto exists apart from the rest of the county and indeed the state, are simply not interests solely of those persons living within the geographical boundaries of what has been designated in this cause as a Ghetto. These are interests of persons, voters, scattered throughout the county and further, throughout the state. Under our system of government, legislators are chosen from geographical areas set off by lines which we call districts. The voters of any given legislative district might for instance have interests representative of interests throughout the state. Persons living

within a legislative district, having a special interest, must confront the legislators elected from their district with their demands. The power of the persons having a special interest when confronting their legislator is always the same whether those persons are rich or poor, doctor or mechanic, white or black. That power is, "I am a voter and I demand your attention." "If I do not get your attention, you will no longer have my vote!" "What's more, I may actively campaign against you in the next campaign." The power of the Ghettoites is no different. The district court found that 132,000 persons lived in the "Center Township Ghetto" out of 698,000 for all of Marion County, according to the 1960 census. The legislators elected at-large from Marion County are not elected by their friends or neighbors or even the voters residing within the same township in which they reside. They are elected by *all* of the people of Marion County. Not one legislator elected from Marion County can afford to ignore the wishes of 132,000 people. No legislator elected from Marion County can afford to ignore the hopes, dreams, wishes and desires of almost 20% of the electorate, nor does the evidence show they have. The decision of the district court must be reversed. To hold otherwise, would significantly affect our system of government.

The district court found to exist what it has referred to as a legally cognizable racial minority group, that is to say, Negroes residing in the "Center Township Ghetto" as defined by the district court. The State has already argued that the Negroes residing in what the court referred to as the "Center Township Ghetto" constitute a special interest group. Certainly Negroes having interests similar to those living within the Center Township Ghetto live within Marion County outside the Ghetto area. Voter Chavis, a resident of Washington Township, is one. Certainly, similarly situated Negroes reside in other areas within the state.

Voter Walker, a resident of Lake County, is one. As Negroes having a special interest they do not differ from any other cross segment of the population of the state having special interests. As this court has said in *Reynolds v. Sims,* 377 U.S. 533, 560 (1964), ". . . the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. . . ."

> "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Reynolds, supra,* at p. 562.

Only last Term, this Court in *Kirkpatrick v. Priesler,* 394 U.S. 526, 533 (1969), rejected, as a justification for variances from the principle of one-man one-vote, the need ". . . to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interests in Congress. . . ." Quoting from *Reynolds, supra,* this Court, in *Kirkpatrick, supra,* held:

> ". . . to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premises of the constitutional command to provide equal representation for equal numbers of people. Neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests cast votes." at p. 533.

Turning to multi-member districting laws, they were in effect in some 18 state senates and 38 state houses of representatives in 1965. In *Reynolds, supra,* this Court expressly recognized that multi-member districts are constitutionally permissible when in accord with "the overriding

objective" of "substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen of the state." 377 U.S., at pp. 578-579. In later cases, this Court rejected broad constitutional attacks on multi-member districts stating that, where the requirements of *Reynolds, supra,* are met, multi-member districts will constitute an invidious discrimination "only if it can be shown that designedly or otherwise a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Burns v. Richardson,* 384 U.S. 73, 88 (1966), quoting *Fortson v. Dorsey,* 379 U.S. 433, 439 (1965). In fact, however, this Court has never invalidated a multi-member districting system. Indeed in three other cases, this Court has affirmed without opinion district court decisions upholding multi-member districts. *Crawford County Bar Association v. Faubus,* 383 U.S. 271 (1966), affirming *Yancy v. Faubus,* 251 F.Supp. 948 (E.D. Ark. 1966); *Harrison v. Schaeffer,* 383 U.S. 269 (1966), affirming, *Schaeffer v. Thompson,* 251 F.Supp. 450 (D. Wyo. 1965), *Burnette v. Davis,* 382 U.S. 42 (1965), affirming, *Mann v. Davis,* 245 F.Supp. 241 (E.D. Va. 1965).

There would appear to be nothing in any decision of this Court which would justify the district court's decision in this case. In fact the district court's reliance on such political considerations as the control of political parties in the county chairman over the selection of legislators and their vote in the state legislature would seem to be contrary to this Court's prohibition, in *Baker v. Carr,* 369 U.S. 186, 217 (1962), against judicial incursion into "political questions." See also, Mr. Justice Harlan, dissenting in *Reynolds, supra,* where he said that no judicially manageable standard can determine whether a state should have single mem-

ber districts or multi member districts or some combination of both.

The district court's decision finding the Marion County multi member district unconstitutional was based on its finding that a cognizable racial minority group, Negroes living in the "Center Township Ghetto" of Marion County, had not received their proportional share of legislators living in that area. However, this Court's decisions concerning multi member districting have spoken only of minimization or cancellation of the voting strength of "racial or political elements" of the voting population, *Burns, supra,* 384 U.S., at p. 88, and not of the voting strength of "racial, socio, economic" groups or other identifiable interests. More fundamentally, this Court has never adopted the extremist theory that a special interest group has a constitutional right to proportional representation in government. For instance, this Court refused to allow population variances in order to create districts with specific interest orientations in *Kirkpatrick, supra,* 394 U.S., at p. 533; *Wells v. Rockefeller,* 394 U.S. 542, 546 (1969); *Reynolds, supra,* 377 U.S., at pp. 561-562. Compare, *Hoyt v. Florida,* 386 U.S. 57, 69 (1967), where this Court said that "[i]n the administration of the jury laws proportionate class representation is not a constitutionally required factor." Compare also, *Clay v. United States,* 397 F.2d 901, 912 (5th Cir. 1968), rehearing denied *en banc,* vacated and remanded on other grounds *sub nom. Giordano v. United States,* 394 U.S. 310 (1969), where it was held that nothing in the Constitution or the Universal Military Training and Selective Service Act requires racially proportioned Selective Service Boards. Indeed, in light of the myriad possible special interest group combinations, adoption of such a theory would be catastrophic for government at all levels. *See also Madison, Federalist Paper No. 10.*

The district court relied, in part, on the suggestion in *Burns, supra,* 384 U.S., at p. 88, that the invidious effect of multi member districts could be more easily shown if, (1) districts were large in relation to the total number of legislators, (2) districts were not so subdivided as to assure distribution of legislators over the entire district and (3) the districts characterized both houses of a bi-cameral legislature. However, such considerations are plainly only factors in the overall determination of whether the voting strength of a racial or political group has been designedly minimized, or totally and substantially submerged. The state thinks it clear that such a characterization of the Marion County multi-member district cannot be made without an additional finding that the Marion County multi-member district had been adopted as a means of frustrating minority rights or, in point of unlikely fact, that the Marion County legislators had ignored or failed properly to represent the needs and interests of the subject racial or political group. It is highly significant that in the instant case no such findings were made.

In summary, the state submits that the district court's invalidation of the Marion County multi-member district was based upon a constitutionally impermissible analysis of abstract political considerations and on stringent and unprecedented requirement of proportional representation of one of many possible special interest group combinations. To adopt the district court's reasoning would jeopardize not only multi-member districts prevailing in a substantial number of states but a multiplicity of another political institutions. For instance, the reasoning of the district court might be applied to invalidate a single member districting scheme which had a relatively low number of legislators on the theory that one legislator could not effectively represent the many interests of a large constituency.

II

THE DECISION OF THE DISTRICT COURT REAPPORTIONING THE STATE OF INDIANA SHOULD BE REVERSED BECAUSE IT DESIGNEDLY PROTECTS THE GEOGRAPHICAL AND POLITICAL SOLIDARITY OF A COGNIZABLE RACIAL MINORITY GROUP FOUND TO RESIDE WITHIN THE CENTER TOWNSHIP GHETTO AREA FOR THE SOLE PURPOSE OF PRESERVING ITS POLITICAL VOTING STRENGTH.

The districting plan adopted by the district court in its order of December 15, 1969, is unconstitutional to the extent to which it was expressly designed to protect the geographical and political solidarity of a cognizable racial minority group found to reside within the "Center Township Ghetto" by separately districting the Ghetto for the purpose of preserving its political voting strength. Having concluded in its order of July 28, 1969, that the Marion County multi-member districting provisions of the Indiana Apportionment Act of 1965 were unconstitutional in that they operated to minimize and cancel out the voting strength of the residents of the "Center Township Ghetto," the district court devised districts for the house and the senate approximating the "Center Township Ghetto." Turning to the district court's opinion in its order of December 15, 1969, the state notes that on the one hand the district court rejected a plan of the intervening defendants below because large suburban areas were combined with parts of the "Center Township Ghetto," contrary to the teachings of *Gomillion v. Lightfoot,* 364 U.S. 339 (1960), condemning gerrymandering. The state, also sees gerrymandering as devising districts with a view to the characteristics of those living within a proposed district. (A. pp. 394-395).

On the other hand the districting plan adopted by the lower court was expressly chosen because it protected

". . . the legally cognizable racial minority group [residents of the ghetto] against dilution of its voting strength . . ." for both the house and the senate of the state legislature. (A. p. 395). And again, the district court said:

> "In establishing district lines for the metropolitan areas of the state, the Court has taken judicial notice of the *1960* census statistics as to the location of the non-white population. The single-member district plan gives recognition to the cognizable racial minority group whose grievance led to this litigation." (A. p. 397).

In *Gomillion, supra,* the Alabama State Legislature passed an enactment redefining the boundaries of the City of Tuskegee so that Negroes who were residents and voters in city elections prior to the legislative enactment in issue were outside the redefined City of Tuskegee. This Court declared the Alabama Legislative Enactment unconstitutional because it singled out ". . . a readily isolated segment of a racial minority group for special discriminatory treatment. . . ." 364 U.S. at p. 346. Although the factual situation in *Gomillion, supra,* differs superficially from the factual situation in this cause, the state submits that the principles to be applied are the same. In *Gomillion,* former residents of the City of Tuskegee were gerrymandered out of the city thereby depriving former residents of the city of the right to vote in city elections. The city district lines were specifically drawn to exclude former voters from the city solely because they were Negroes. In this cause, the Negro voters of the Ghetto have not been districted out of their vote. Rather, quite the opposite is true, the district lines have been drawn around the Ghetto specifically with a view to maintaining the geographical political solidarity of the voters within the Ghetto. The state submits, that under the principles enunciated in *Gomillion,* if district lines should not be drawn specifically with a view to excluding Negro

voters, then, district lines should not be drawn with a view specifically to confine Negro voters to a Ghetto.

The ramifications of affirming this aspect of the district court's order of December 15, 1969 are of great consequence. Should this Court affirm this aspect of the district court's decision, the reapportionment battles of the decade of the 70's will be directed quite likely toward the actual physical drawing of the district lines as well as population per district. The negro voters of the Ghetto are a special interest group entitled to no additional consideration. This Court has never held, nor should it hold, that the interests of *any* group are so unique or so special that they are entitled to be separately districted or confined.

III

THE DECISION IN THE CASE OF *STOUT V. BOTTORF*, 249 F.Supp. 488 (D.C. Ind. 1965), UPHOLDING THE CONSTITUTIONALITY OF THE INDIANA APPORTIONMENT ACT OF 1965, SERVED TO BAR THE DISTRICT COURT FROM DECLARING UNCONSTITUTIONAL THE MULTI-MEMBER DISTRICTING PROVISIONS OF THE SAME ACT, AS THEY RELATED TO MARION COUNTY, AND SERVED TO BAR THE DISTRICT COURT FROM ACTUALLY REAPPORTIONING THE STATE OF INDIANA, IN VIEW OF THIS COURT'S DECISION IN *REYNOLDS V. SIMS*, 377 U.S. 533, 583 (1964), LIMITING THE NECESSITY TO REAPPORTION CONSTITUTIONALLY TO ONCE BETWEEN EACH DECENNIAL CENSUS.

The history of Indiana's attempt to reapportion districts for the state legislature constitutionally began with the districts court's decision in *Stout v. Hendricks*, 228 F.Supp. 568 (D.C. Ind. 1963), declaring unconstitutional a 1921 act apportioning districts for the state legislature. The district

court enjoined the state from conducting any further elections for the state legislature under the 1921 Acts, but postponed the effect of the injunction until after the 1964 elections.

During the 1963 regular session of the state legislature a new apportionment act was passed, but was vetoed by the governor. The legislature failed to override the governor's veto. Subsequently, the Indiana Supreme Court effectively set aside the veto, and the 1964 elections were conducted under the 1963 Act.

The 1965 regular session of the state legislature again enacted legislation reapportioning the state. However, the district court found these acts to be constitutionally infirm in *Stout v. Bottorff*, 246 F.Supp. 825 (D.C. Ind. 1965).

In response to the district court's decision in the first *Stout* case, *supra*, a second special session of the state legislature was convened on October 18, 1965. In its second special session of that year, the state legislature enacted four acts apportioning the senate and four acts apportioning the house of representatives. The acts were submitted to the district court as plans to be considered in the alternative. These alternative acts were considered by the district court in what may be regarded as the second *Stout* case. See, *Stout v. Bottorff*, 249 F.Supp. 488 (D.C. Ind. 1965). Of the plans submitted, the district court selected what were referred to in its opinion as Senate Plan B and House Plan C as meeting constitutional standards. Senate Plan B and House Plan C were the Indiana Apportionment Act of 1965 which is the subject of litigation in this cause.

In the second *Stout* case, *supra*, the district court specifically found that the Indiana apportionment act of 1965 ". . . provided substantially equal state legislative representation for all voters in Indiana regardless of where they reside[d]. . . ." The district court went on to declare that

the Indiana Apportionment Act of 1965 had met the federal requirements of *Reynolds v. Sims*, 249 F. Supp., at p. 493.

Notwithstanding the district court's decision in the second *Stout* case, *supra*, the district court in this cause declared the multi-member districting provisions of the Indiana Apportionment Act of 1965 as they related to Marion County unconstitutional in its order of July 28, 1969, and imposed its own districting plan on the state in its order of December 15, 1969. In so doing, the district court ignored the holdings of this Court in *Reynolds v. Sims, supra*. In *Reynolds v. Sims, supra*, at p. 583, this Court said that ". . . [d]ecennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth." Furthermore, this Court did not regard the ". . . Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. . . ." At p. 583. In this Court's opinion, at that time, decennial reapportionment would clearly meet the minimal requirements for maintaining a reasonably current scheme of legislative representation. ". . . All limitations on the frequency of reapportionment are justified by the need for stability in continuity in the organization of the legislative system. . . ." At p. 583. Compare *Nixon et al. v. Brewer et al.*, — F.Supp. — (D.C. N.D. Ala. 1970) (Cause No. 3017-N, decided March 4, 1970); and *Cahoon et al. v. Maddox et al.*, — F.Supp. — (D.C. Atl. D. Ga. 1969) (Cause No. 13011, decided December 9, 1969), refusing to reapportion in light of this aspect of *Reynolds, supra*, on similar facts.

The state met the minimal requirements of this Court with the enactment of the Indiana Apportionment Act of 1965 and its approval as meeting constitutional standards in the second *Stout* case, *supra*. Consequently, the district

court's acts in declaring unconstitutional the Indiana Apportionment Act of 1965 and in imposing a districting plan on the state were clearly without authority and must be reversed.

IV

THE DISTRICT COURT'S ORDER APPORTIONING DISTRICTS FOR THE STATE LEGISLATURE ON THE BASIS OF THE 1960 CENSUS DATA SHOULD BE REVERSED BECAUSE SUBSTANTIAL CHANGES AND SHIFTS IN POPULATION SINCE 1960 RENDERED THE 1960 CENSUS DATA OBSOLETE AND UNRELIABLE, AND BECAUSE THE 1970 CENSUS DATA WOULD BE AVAILABLE TO THE NEXT REGULAR SESSION OF THE STATE LEGISLATURE FOR THE PURPOSE OF REAPPORTIONING THE STATE.

On October 24, 1969 the district court announced that 1960 census data would be used as a basis for redistricting the state. (A. p. 392). The districting plan eventually adopted by the district court and imposed upon the state for the purpose of conducting the 1970 election for the state legislature was in fact based on the 1960 census data. (A. p. 396). In answer to objections that the 1960 census data were so outdated as not to be reliable, the district court declared that the 1960 census data would simply have to be tolerated. (A. p. 394). The district court's plan was promulgated on December 15, 1969, less than a month before census takers would begin compiling the 1970 census. In so doing, the district court committed reversible error.

First of all, the district court's plan, promulgated in its own order of December 15, 1969, created grossly impermissible and unconstitutional variances among the districts as tested by available 1969 census data. As the state il-

lustrated in its Emergency Application for a Stay of the district court's order which was granted by this court on February 2, 1970, 90 S. Ct. 748 (1970), measurable inequality far exceeding the inequalities found by the district court in its opinion on July 28, 1969, were fostered, Applying estimates of the Metropolitan Planning Commission of Marion County as of June 30, 1969, compiled by census tract for Marion County, to the district court's plan of December 15, 1969, it became obvious that all of Center Township was grossly *over*-represented. The four districts approximating the so-called Center Township Ghetto, were 17% over-represented, on the average. While the population of Marion County was growing as a whole, all of Center Township, including the Ghetto area, had experienced a decrease in population. On the other hand, three Marion County districts outside of Center Township comprising suburban areas of Marion County were grossly *under*-represented to the extent of 36%, 45%, and 50%.

Apart from the results actually obtained by the use of the 1960 census data, on the eve of the 1970 general elections, other federal courts passing on the question have uniformly refused to require reapportionment in 1969 because of the obsolecence of the 1960 census data. *Skolnick v. Mayor*, 415 F.2d 1291 (7th Cir. 1969) (decided August 8, 1969); *Skolnick et al. v. State Electoral Board*, 307 F.Supp. 691 (D.C.E.D. Ill. 1969); *Cahoon et al. v. Maddox et al.*, — F.Supp. — (D.C. Atl. D. Ga. 1969) (cause no 13011, decided December 9, 1969); see also, *Nixon et al. v. Brewer et al.*, — F.Supp. — (D.C. N.D. Ala. 1970) (Cause No. 3017-N, decided March 4, 1940).

Although the City of Chicago was malapportioned for the purpose of conducting an election for the city council, the court in *Skolnick v. Mayor et al., supra*, refused to re-

quire reapportionment on the basis of the 1960 census data because:

> "It is certain that a reapportionment based on the 1960 census figures cannot be used for present reapportionment of the wards. All would agree they are not reliable because of obvious and substantial population changes and shifts since 1960. No relevant supplemental data has been shown to be available. . . . " 415 F.2d at page 1298.

Interestingly enough, the court distinguished the case of *Chavis v. Whitcomb*, 305 F.Supp. 1364 (D.C. Ind. 1969), the subject of this litigation. Apparently the 7th Circuit Court of Appeals inferred, from the district court's decision in *Chavis*, that the 1967 estimates upon which the district court in *Chavis* relied so strongly would be used to reapportion the state. This inference failed to materialize when the district court reapportioned the State of Indiana on the basis of the *1960* census data. Thus the decision of the district court, in this cause, to reapportion on the basis of the 1960 census data directly conflicts with the decision of the 7th Circuit Court of Appeals, that a constitutionally valid plan of reapportionment cannot now be devised on the basis of the 1960 census figures.

Although concluding that the Illinois State Legislature was unconstitutionally apportioned, a district court for the Northern District of Illinois, in *Skolnick v. State Electoral Board, supra*, refused to require reapportionment on the basis of the 1960 census figures on the eve of the 1970 General Elections. The district court relied heavily upon the decision of the 7th Circuit Court of Appeals in *Skolnick v. Mayor, supra*. The court had little faith in the efficacy of the 1960 census figures:

> "Here we turn to the fact that since 1960 there have been substantial changes in the distribution of population throughout Illinois (See 'Population

> Estimates and Projections', U.S. Department of Commerce, Series p-25, No. 427, 7-31-69). Of course if exact equality per 1960 figures had been achieved early in the decade such districting would still be in force and be constitutionally valid for the 1970 election notwithstanding these shifts in population. Reynolds v. Sims, p. 583. But to put such a districting in force after the shifts have been known to occur, for only the last election in the decade, and in order to achieve, at best only minor corrections seems to have little weight in its favor." 307 F.Supp., at pp. 694, 695.

The court concluded that the 1960 census figures no longer portrayed the present population scheme. Hence the court concluded:

> ". . . [W]e deem it impractical to draw new maps for the 1970 election, creating districts of equal population according to 1960 figures or to order any special census, or an at-large election. Thus we, a Court of Equity, are presented with the only equitable alternative, to wit, election in 1970 of both Houses under the present (1965) maps. With respect to those maps we find that under the circumstances, 'the best that can be had within the framework of the Constitutional provision applicable until 1970. . .' *Jackman v. Bodine,* 53 N.J. 585, 252 A.2d 209, 211 (1969); cert. denied, 396 U.S. 822 . . . Oct. 13, 1969." 307 F.Supp., at p. 697.

Again, although congressional districts for the State of Georgia were unconstitutionally apportioned, a district court for the Northern District of Georgia, in *Cahoon et al v. Maddox et al., supra,* refused to require reapportionment on the basis of the 1960 census figures on the eve of the 1970 elections. In accordance with this Court's decision in *Westberry v. Sanders,* 376 U.S. 1 (1964), finding the Georgia statute apportioning congressional districts unconstitutional, the General Assembly of Georgia constitutionally reapportioned, with the approval of the district

court in 1964. However, since this Court had narrowed the allowable variances among districts in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), and *Wells v. Rockefeller*, 394 U.S. 542 (1969), the Georgia reapportionment statute, constitutional in 1964, was no longer constitutional. Nevertheless, the district court refused to require reapportionment now. First of all, the district court refused to require reapportionment because the state had constitutionally reapportioned in 1964:

> "In Reynolds v. Sims, 1964, 377 U.S. 522, 84 S. Ct. 1362, 12 L. Ed. 2d 506, the court held that one reapportionment between each decennial census meets the constitutional requirement. 377 U.S. at 583-584. This was a practical answer in the interest of stability in government to the fact of constant shifts in population."

But also, the court refused to require reapportionment on the basis of the 1960 census figures because of substantial shifts in the population since 1960:

> "The problem is compounded by current population estimates which reflect substantial population shifts in the state since 1960. Population estimates prepared by the Georgia Department of Health indicate spectacular growth in the Fourth, Sixth, and Seventh small districts and substantial lack of growth in the First, Second, Third, Eighth and Ninth districts. Only the Fifth and Tenth districts are having average growth. These estimates raise the spector of massive shifts of counties and even parts of counties to accomplish constitutional apportionment and we conclude that a piecemeal approach, using estimated populations, so near the 1970 census is not warranted."

With the exception of this district court, the federal courts have consistently refused to require reapportionment on the eve of the 1970 general election on the basis

of the 1960 census figures, because they are obsolete and unreliable. It is noteworthy in this regard that the district court's plan was not announced until December 15, 1969, a mere sixteen days before the first day of the year 1970, when the 1970 census would begin. Thus the district court's decision to redistrict the state on the basis of the 1960 census should be reversed.

V

THE DISTRICT COURT COMMITTED REVERSIBLE ERROR WHEN IT REQUIRED SINGLE MEMBER DISTRICTS THROUGHOUT THE STATE BECAUSE THERE WAS A CLEAR STATE PREFERENCE FOR SOME MULTI-MEMBER DISTRICTS AND BECAUSE THERE WAS AN ABSOLUTE ABSENCE OF EVIDENCE TO SHOW THAT THE MULTI-MEMBER DISTRICTS IN THE STATE OTHER THAN MARION COUNTY WERE IN ANY WAY CONSTITUTIONALLY INFIRM.

The district court erred, as a matter of law, when, in view of the facts of this cause it adopted a single-member districting plan. To understand how the district court erred in this regard, it is necessary to place the district court plan in the proper context.

Under the Indiana Apportionment Act of 1965, there are eight multi-member districts for the Senate and twenty-five for the House. The complaint in this cause challenged only the Marion County multi-member districts. The district court in this cause did not declare all of the Indiana Apportionment Act of 1965 unconstitutional. The district court entered no judgment regarding the constitutionality of the remaining seven multi-member districts for the Senate nor the remaining twenty-four for the House. Nevertheless, the district court effectively abolished all multi-member districts in Indiana.

At the trial of this cause, John Banzhaf, an associate professor of law at George Washington University, testified as an expert witness. Banzhaf characterized himself as an expert on the effect of multi-member districts as a tool of the electoral system. Banzhaf testified to the inequality given to the weight of a voter in a multi-member district versus a single-member district, based on a theoretical mathematical analysis devised by himself. According to Banzhaf's analysis, a voter in a multi-member district casts more critical votes than a voter in a single-member district because a voter in a multi-member district has more candidates from which to choose. Furthermore, he testified, if the legislators from a multi-member district vote as a bloc, each legislator's vote has a greater weight than that of a legislator from a single-member district. Significantly, all Banzhaf could say regarding the Marion County multi-member district was that if Marion County had a multi-member district then votes of Marion County residents had a greater weight than did votes of the residents of single-member districts within Indiana. (A. pp. 139-155).

Adopting Banzhaf's analysis as representing reality, the district court applied the analysis to districts within Indiana and found that Marion County voters had a greater voice in the legislature than comparable voters in a single-member district within the state. (A. pp. 377-379).

Implicit in the decision of the district court was a finding that a scheme of reapportionment combining districts electing different numbers of legislators was inherently unequal and hence unconstitutional. For instance, the district court said:

> ". . . We note that if all districts were equal in size and elected equal numbers of legislators, then all constituents of each district would have the same voice in the legislature. . . ." (A. p. 378).

The district court went on to say that:

> "The use of uniform districts is one method of curing defects and unequal representation, . . . [thereby eliminating] ". . . problems of critical vote inequality, unequal black representation and unequal members of voices in the legislature per person. While application of the uniform district principle would require all districts to be equal in population and elect equal members of legislators from each uniform district, it does not require single-member districts. . . ." (A. p. 379).

Against this background the district court did in fact adopt a single-member districting plan in it's order of December 15, 1969.

The district court in its opinion of July 28, 1969, made it quite clear that it was requiring districts of uniform size. This requirement of the district court is absolutely without authority. This Court has required no such thing in any of its reported decisions. On the contrary, this Court has explicitly approved districting schemes which provided for districts of unequal size.

In reality the district court's requirement that the districts be of uniform size is but a veiled attack on all the multi-member districts for the House and Senate in Indiana. The district court's sole basis for abolishing multi-member districts in Indiana was the theoretical mathematical analysis of John Banzhaf who testified in this cause.

In fact, the effect of the district court's decision is to find any reapportionment scheme providing for a mixture of multi-member districts with single-member districts, unconstitutional *per se*. This is directly contrary to the holdings of this Court in *Fortson v. Dorsey*, 379 U.S. 433 (1965). In *Fortson*, this Court was faced with a challenge to a re-

apportionment scheme combining multi-member districts with single-member districts. This Court reversed the decision of the district court in that case holding that "... the multi-member constituency feature of the Georgia scheme was *per se* bad. 379 U.S., at p. 483.

Furthermore, this court in *Fortson, supra,* quoting from *Reynolds, supra,* said:

> "Only last Term, in our opinion in *Reynolds* v. *Simms,* 377 U.S. 533, decided after the decision below (referring to the Fortson decision), we rejected the notion that equal protection necessarily requires the formation of single-member districts." 379 U.S. at p. 436.

Thus, to the extent to which the district court impliedly found Indiana's apportionment scheme unconstitutional for mixing multi-member districts with single-member districts, and to the extent that it required all single-member districts, its decision should be reversed.

VI

THE COURT ORDERED DISTRICTING PLAN SHOULD BE REVERSED BECAUSE IT CREATED SENATE DISTRICTS WHICH CROSSED COUNTY LINES CONTRARY TO THE PROHIBITION OF ARTICLE 4, SECTION 6, OF THE INDIANA CONSTITUTION AND BECAUSE THE DISTRICTING PLAN DEVISED BY THE COURT OPERATED TO DEPRIVE 25 DULY ELECTED SENATORS OF THE RIGHT TO SERVE THEIR FULL TERM AS REQUIRED BY ARTICLE 4, SECTION 3, OF THE INDIANA CONSTITUTION, AND THUS ALSO VIOLATED THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

The district court's plan, adopted in its order of December 15, 1969, provides for districts which cross county lines and serves to effectively deprive 25 holdover senators of the right to serve out the balance of their four-year terms.

Article 4, § 3 of the Indiana Constitution regarding terms of office provides that:

> "Senators shall be elected for the term of four years, and Representatives for the term of two years, from the day next after their general election: Provided, however, that the Senators elect, at the second meeting of the General Assembly under this Constitution, shall be divided, by lot, into two equal classes, as nearly as may be; and the seats of Senators of the first class shall be vacated at the expiration of two years, and those of the second class, at the expiration of four years; so that one-half as nearly as possible, shall be chosen bienially forever thereafter. And in case of increase in the number of Senators, they shall be so annexed, by lot, to one or the other of the two classes, as to keep them as nearly equal as practicable."

As to crossing county lines, Article 4, § 6 of the Indiana Constitution provides that:

> "A Senatorial or Representative District, where more than one county shall constitute a district, shall be composed of contiguous counties; and no county for Senatorial apportionment, shall ever be divided."

On October 24, 1969, the district court announced that ". . . that county and township boundary lines would be crossed in drawing district lines wherever necessary to achieve equality of population in the districts but that the Court would strive to preserve the integrity of county and township lines." (A. p. 392). As to the holdover senators, the district court declared that the senators elected for four-year terms but who had only served a two-year term

did not have a vested right to serve out the balance of their four-year term. (A. pp. 397-398).

While being mindful of this Court's declaration in *Reynolds v. Sims*, 377 U.S., at p. 584 that ". . . [w]hen there is an unavoidable conflict between the Federal and the State Constitution, the Supremacy Clause of course controlled," and subsequent decisions of this Court applying the principle, the state nevertheless submits that the district court erred when it devised districts which crossed county lines and deprived all holdover senators of their second-year term in this cause. The district court's sole justification for violating the dictates of the Indiana Constitution was that it was necessary to do so in order to achieve mathematical equality among districts. (A. p. 395). The district court did in fact obtain near mathematical equality, the deviations among districts in both houses were kept within a ± 1%. The state submits that the district court's error was in running roughshod over provisions of the Indiana Constitution in order to achieve pure mathematical equality when this Court does not require pure mathematical equality when apportioning for a state legislature.

In *Reynolds, supra*, at p. 577-581, this Court declared that mathematical exactness or precision is hardly a workable constitutional requirement in the area of state legislative apportionment and that legitimate state considerations might justify some deviations from a one man-one vote principle. See also *Swann v. Adams*, 385 U.S. 440 (1967). In *Kirkpatrick, supra*, and *Wells, supra*, this court apparently narrowed the range of deviations from a pure population standard which it would allow in any scheme for apportioning congressional districts in the absence of some rational justification. In this cause, the district court applied *Kirkpatrick, supra*, and *Wells, supra*, as requiring mathematical exactness in reapportioning districts for Indiana's State Legislature. The State submits that in so

doing, the district court unjustifiably violated the Indiana Constitution.

In *Reynolds, supra,* at p. 578, this Court expressly recognized that distinctions might well be made between Congressional and State legislative districting and asserted more flexibility might be constitutionally permissible in districting for state legislature than in districting for congressional districts. This case represents the reverse of the situation where the State comes before this court with an apportionment scheme in which there are substantial deviations among districts. The error in this case is not the *per se* violation of the Indiana Constitution. Rather, the error is in providing for pure mathematical equality without having meaningfully considered the possibilities of a districting scheme which did not violate the Indiana Constitution, a legitimate state concern. Having assumed the responsibility for reapportioning the Indiana State legislative districts, it was incumbent upon the district court to make every effort to devise an apportionment scheme which did not violate the Indiana Constitution. This the district court did not do. Having violated the Indiana Constitution in devising districts for the state legislature, it was incumbent upon the district court to justify the violation of the Indiana Constitutional provisions involved. This the district court did not do. The Fourteenth Amendment to the Constitution of the United States must serve to limit the acts of the district court to the same extent to which it limits acts of the state legislature in the reapportionment area. Compare, *Kirkpatrick v. Preisler, supra* (failure of state to justify deviations). Consequently, the state submits that the decision of the district court should be reversed because it violated the Indiana Constitution without adequate justification.

CONCLUSION

For these reasons, it is respectfully submitted that the order of the district court should be reversed.

THEODORE L. SENDAK
Attorney General of Indiana

RICHARD C. JOHNSON
Chief Deputy Attorney General

WILLIAM F. THOMPSON
Assistant Attorney General

Counsel for Appellant